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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1756~~ 70-213

GROENDYKE TRANSPORT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING ON COURT'S ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner, pursuant to Rule 58(2) of this Court, respectfully prays that the Court reconsider its order entered on October 12, 1971, in the above captioned case denying a writ of certiorari. Petitioner submits that the Court has overlooked or misapprehended the extent of conflict among the Courts of Appeal on the issues raised in this case. In addition, if the decision of the Fifth Appeals Court prevails, a large wholly integrated nationally operating motor common carrier will be destroyed eliminating from the national economy hundreds of jobs. The Petitioner is not fighting unionism. It is only fighting fragmentized unionism under which a wholly integrated company like the Petitioner cannot possibly operate.

REASONS FOR GRANTING PETITIONER'S PETITION FOR REHEARING

The decision of the United States Court of Appeals for the Fifth Circuit in this case is also in conflict with the recently reported decision of the Ninth Circuit in *Westward-Ho Hotel Co.* v. *NLRB*, 437 F. 2d 1110 (1971).

STATEMENT OF POINTS OF LAW OVERLOOKED OR MISAPPREHENDED

Whether the reasons assigned by the Board for its actions in this case were adequate to explain its departure from established standards on grounds other than extent of union organization.

ARGUMENT AND AUTHORITIES

In *Westward-Ho Hotel Co.* v. *NLRB*, supra, the Court of Appeals for the Ninth Circuit noted in its opinion that—

> "- - - the Board's action here seems to be a retrogression to *Botany Worsted Mills*, 27 NLRB 687 (1940), which appears from the legislative history of §9(c) (5) to have been the kind of unit determination Congress intended to preclude. The House Report on §9(c) (5) expressly criticized that decision as an example of a case in which 'the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate.' H.R.Rep. No. 245, 80th Cong., 1st Sess. 37 (1947). We find that *Botany Worsted Mills* on its facts so closely resembles the case now before us that respect for Congressional intent in the enactment of §9(c) (5) precludes enforcement of the Board's order here."

In *Botany Worsted Mills,* the Board's stated policy was to the effect that—

> "Even if under other circumstances, the wool sorters or trappers would not constitute the most effective bargaining unit, nevertheless, in the existing circumstances, *unless they are recognized as a separate unit, there will be no collective bargaining agent whatsoever for these workers.*" 27 NLRB at 690.

The Court in this case has approved a Board finding which in effect furthers the policy adopted in *Botany Worsted Mills.*

In contrast, the Third Circuit has adopted a strict construction of §9(c) (5) stating that non-organizational factors must be substantial enough to justify a finding of appropriateness without the help of the extent of organization.

> "The certified appropriate unit must be in and of itself appropriate, apart from the extent of employee organization."
>
> *NLRB* v. *The Western & Southern Life Insurance Co.*, 3 Cir., 391 F. 2d 119, cert. denied 393 U.S. 978, 89 S.Ct. 445, 21 L.Ed.2d 439 (1968).

This Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed.2d 951, has made it clear that unit determinations are not to be lightly regarded.

> "Unit determination accordingly has important consequences on the character of bargaining structures, work assignment disputes between unions, and the relative power of labor and management. . . ."
>
> B. Meltzer, *Labor Law*, 290 (1970).

The Court, in *Westward-Ho Hotel Co.* v. *NLRB*, supra, relied to some extent on *Local 1325 Retail Clerk's Int'l.*

Assn. AFL-CIO v. *NLRB*, 414 F. 2d 1194 (1969). In this decision the Court stated:

> "Thus, a single store unit, if requested, will be approved unless it is shown that a single store *lacks meaningful identity as a self-contained economic unit.*"

The Board's order entered in this case made no finding that petitioner's terminals were self-contained economic units. And, as a matter of undisputed evidence, they are not.

As a result of fragmentizing the employer's operations for the purpose of collective bargaining, the employer will be faced with a "whipsaw" effect within its own organization.

> "Such 'whipsawing' can be detrimental not only to management and union negotiations but can multiply the chances of cessation or diminution of business operations to the damage of the - - - public." (Dissenting Opinion)
>
> *NLRB* v. *Winnebago Television Corp.*, 440 F. 2d 369 (1971).

The employer in this case is a motor common carrier with a paramount duty to serve the public under the stringent regulations of the Interstate Commerce Commission. The imposition of a duty to simultaneously negotiate *five* separate labor contracts not only places a catastrophic burden upon the employer but ultimately will affect the service rendered to the public and the rates the customers will have to pay.

CONCLUSION

Petitioner respectfully requests the Court to reconsider its order of denial of a writ of certiorari by resubmitting this case to a court consisting of nine members.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel, one of the counsel of record for petitioner, certifies that the foregoing Petition for Rehearing is presented in good faith, not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court of the United States.

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